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## CURRENT TOPICS

### Dr. W. T. S. Stallybrass

THE country has suffered a great loss by reason of the tragically sudden death of Dr. W. T. S. STALLYBRASS in a railway accident. Generations of solicitors, barristers and judges have studied at his feet, and the affection which they feel for him is symbolised by the retention of his pet nickname "Sonners" in talk about him, long after its connotation was forgotten. He was one of those dons who remained, although a teacher, essentially a man of the world. He owed this in part to his own unique-cast of mind, and in part to his first love, the Bar, which he somewhat reluctantly deserted after five years' practice, to accept an invitation to become a Fellow of Brasenose College, Oxford, of which he became Principal in 1936. His editions of Salmond on Torts were frequently cited with approval by judges; he was a member of the Lord Chancellor's Law Revision Committee and he was an honorary bencher of the Inner Temple. In 1947 he became Vice-Chancellor of Oxford University.

### Mr. Arthur Griffith

A WELL-KNOWN solicitor, Mr. ARTHUR GRIFFITH, of Lewis and Lewis, died on 28th October, at Bournemouth, at the ripe old age of ninety-three. He began with Lewis and Lewis at the age of twenty-two, and that great solicitor, Sir George Lewis, quick to recognise ability, eventually made him his confidential secretary and managing clerk. He was admitted a solicitor in 1900. In the course of his work Mr. Griffith became the friend and confidant of such great men as Parnell, through acting for the Irish party in the Parnell Commission and in other well-known cases. He retired in 1942.

### The King's Speech

THE opening of the new Parliamentary Session on 26th October was one of the most important events, so far as the legal profession is concerned, for some years past. "You will be asked," HIS MAJESTY stated in his Gracious Speech, "to consider proposals for making legal aid and advice more readily available to persons of small and moderate means." The knowledge that time has at last been found for this great and overdue measure—not without considerable pressure emanating largely from both sides of the profession—will give satisfaction everywhere. We still do not know what the proposals are, and many solicitors and counsel are of the opinion that this uncertainty has a present dampening effect on litigation. For the same reason it will be important to speed the Bill's progress through Parliament, without prejudicing, of course, the reasonable amount of debate

usually accorded. Other measures, apart from the controversial Parliament and Steel Bills, include one to establish national parks in England and Wales, to improve the law relating to footpaths and access to the countryside, and to ensure the better conservation of wild life; one to improve the organisation of magistrates' courts in England and Wales and to amend the law relating to justices of the peace; one to provide for the payment of jurors and for the abolition, with limited exceptions, of special jurors; one to provide for reviewing the rents of shared rooms (in the *Neale v. Del Soto* type of tenancy) and of houses and flats let for the first time since the war; and one to amend and consolidate the law of patents and designs.

### Independence of the Legal Profession

THE time is ripe for some assurance from those in authority that there is no threat to the independence of the legal profession in any new schemes of reform. No one can nowadays rightly accuse the profession of being reactionary and, in fact, the London and Provincial Law Societies have proved the reverse. But recent utterances by politicians in power and office have shown no great desire to secure the profession's independence. It is the more refreshing, therefore, to hear from the lips of the Lord Advocate, Mr. JOHN WHEATLEY, K.C., addressing members of the Society of Solicitors to the Supreme Courts in Scotland on 23rd October, that he did not think that there was any danger of the organised body of the profession being turned into a legal T.U.C. If, he said, the principles embodied in the Rushcliffe and the Cameron Reports were put into effect there was not the slightest danger of nationalising the legal profession. There might be radical changes, he continued, affecting the law and administration in the near future, but whatever these changes were, he felt confident that members of the legal profession would always have regard to their tradition of service to the public. The Lord President of the Court of Session (LORD COOPER) had previously expressed the hope that the proposal to have one Law Society for the whole of Scotland would not result in the establishment of a kind of legal T.U.C. and the loss of identity by historic bodies, as that would be a disaster to the administration of justice and the law of Scotland.

### A Legal "Literary Luncheon"

A LITERARY luncheon is rarely the occasion for legal reminiscence. Such a rare occasion was Foyle's Literary Luncheon, held on 27th October, 1948, in honour of

Sir PATRICK HASTINGS, K.C., other guests including Sir TRAVERS HUMPHREYS, P.C., Viscount and Lady SIMON, Sir FRANK SOSKICE, K.C., M.P., and Sir BANISTER FLETCHER, D.Litt., F.S.A. Viscount Simon, who was in the chair, offered congratulations to Sir Patrick on his recently published autobiography and referred to his having employed Sir Patrick in his early days in a secretarial capacity for one hour a day at what seemed to-day most inadequate remuneration. Though Sir Patrick would have made a very good judge, he (Lord Simon) did not feel that the highly responsible but inhospitable work of a judge was his appropriate field. Sir Patrick had struck a new line as a dramatist and author. He had enjoyed seeing "The Blind Goddess" and thought it provided the best court scene since Gilbert's "Trial by Jury" or Shakespeare's "Merchant of Venice." He thought he could identify the opposing King's Counsel in the scene. In reply, Sir Patrick said that Lord Simon had made one very bad mistake. It was in engaging him as private secretary. He couldn't spell, his writing was not readable and he was soon sacked. He received a cheque from Lord Simon, on the strength of which he married. He had tried to recall the incidents of his two years' military service but could only remember that he had been charged with every crime in the little red book. Although he had defended himself and had, no doubt, done it very well, he was invariably convicted. Perhaps we may be permitted to comment respectfully that it may have been due to convictions acquired in the course of his military career that Sir Patrick acquitted himself so well in civil life.

#### Criminal Justice Act, 1948 : Date of Commencement

A FURTHER Order in Council has now been made fixing the dates on which a large number of provisions of the Criminal Justice Act, 1948, are to come into operation. Two previous orders have already brought into force, as from 13th September last, considerable portions of the Act (see *ante*, pp. 459, 490, 531). The new order—the Criminal Justice Act, 1948 (Date of Commencement) (No. 3) Order, 1948 (S.I. 1948 No. 2439)—fixes 27th December, 1948, and 18th April, 1949, as the dates on which two further large instalments are to become operative. Space precludes even a brief indication here of the matters covered by these provisions and it must suffice for the moment to list them numerically; an article to appear in an early issue of the JOURNAL will deal with them in more detail. Sections coming into force on 27th December, 1948, are: ss. 13 to 15, 17, 20 and Sched. II, 24 to 29, 34 to 36, 39 to 41, 43, 48, 53, 58 to 60, 65, 66, 72, 77 (3) in part, 79 and part of Sched. IX, and in part 81 and 83 (3). Provisions to come into operation on 18th April, 1949, are: s. 61 (5) and Sched. VII, paras. 1 and 7, s. 78 and Sched. VIII, para. 4, and in part ss. 81 and 83 (3).

#### The Manchester and Salford Poor Man's Lawyer Association

THE annual report, 1947-48, of the Manchester and Salford Poor Man's Lawyer Association shows that the number of cases referred to solicitors has increased slightly, but the number of cases referred to the poor persons' committee has slightly decreased. Matrimonial and family cases have decreased from 49 per cent. to 45 per cent. of the total; landlord and tenant cases are still 12 per cent.; damage and accident cases rose from 5.5 per cent. to 7 per cent.; libel and slander cases from 3.5 to 5 per cent.; and debts and moneylending cases from 2 per cent. to 3 per cent. Most of the other types of case remained at the same figure as in the previous year. In view of recent proceedings before the Disciplinary Committee of The Law Society, in which it was alleged that a London solicitor had acted contrary to the Solicitors' Practice Rules, 1936, by attracting business unfairly through acting for reward for a client first introduced to his firm at a free legal advice centre, the Committee of the Association draws attention to the provisions of the Association's rules, which provide for anonymity of the adviser, strict

rotation for selection of conducting solicitors, and the prevention, except in cases of extreme urgency, of an adviser having a case referred to himself or to his firm. The report also quotes with approval our comment in "Current Topics" (*ante*, p. 76) on the Attorney-General's statement in January that it was doubtful whether it would be possible to publish the text of the Rushcliffe Legal Aid Bill before the end of the summer. The report adds: "The Committee of the Association would certainly welcome some information about (a) whether or not there will be any place for a voluntary organisation in the new scheme, and (b) the probable date of starting. The uncertainty about these points has a bearing on the Association's financial position." The report concludes by quoting words uttered twenty years ago by a future Lord Chancellor, now LORD HAILSAM: "I should like to see the day coming when, just as medicine administers, to all who need it, help for the body, so in every great centre of population we might see something akin to a legal hospital, where poor people could rely on getting the advice and help they needed." It is gratifying to read that, in spite of the uncertainty about the date of the Rushcliffe scheme, this Association, whose committee consists mainly of the President, Vice-President and Committee of the Manchester Law Society, successfully continues its vital work.

#### Speeches in Mitigation

WHAT are the ingredients that go to make a good speech in mitigation in the criminal courts? Restrained eloquence, sincerity, a good narrative style, understanding of the judge's mind and emotions are all excellent in their way. The difficulty is to translate them into practice. Even as a teacher is said to learn most from his pupils, so may the advocate learn from the litigant in person. The *Malayan Law Journal* for August and September, 1948, which has just reached us, gives its readers an opportunity to learn something about it by printing a copy of a petition sent to them by Mr. J. G. ADAMS, District Judge, Perak South, Ipoh, from two workmen who had become drunk on toddy after a hard day's work and fell to belabouring one another with their grass-cutting knives. The petitioners begin on a low key by asking for "a discretionary forgiveness making allowance for our stark ignorance made worse by drinks." The trump card, as always, is good character, but they add the authentic note that "it is still surprising to us to have committed an offence by unconsciously injuring ourselves." Then the note swells to an eloquent strain, not devoid of dignified sincerity: "We have long been friends together—we drank together, fought together, got arrested together, got admitted to hospital together, discharged together; together now we prostrate at your feet for mercy . . . We could find no conceivable reason whatsoever for a fight between us. We together sat down for hours to think of any reason and we couldn't find any. All that we know is that we jointly drank in merry friendship. When we came to consciousness we found ourselves in the hospital. That is all that we know." The advocate may be judged by his results. The accused, it is recorded, were cautioned and discharged.

#### Recent Decision

In *Winnan v. Winnan*, on 29th October (*The Times*, 30th October), the Court of Appeal (LORD MORTON OF HENRYTON, BUCKNILL and ASQUITH, L.J.J.), held, dismissing a wife's appeal from a decision of Cassels, J., granting her husband a decree of divorce on the grounds of cruelty and desertion, (1) that there was abundant evidence that the wife had been guilty of cruelty and constructive desertion in refusing to get rid of a large number of cats which she kept in the matrimonial home, and (2) that the fact that the justices had found that the husband had been guilty of wilful neglect to maintain his wife did not operate as *res judicata* so as to estop the Divorce Court from inquiring into whether the wife had been guilty of the matrimonial offence of desertion.

## TRUSTEES AND COMPANY SCHEMES

In the great majority of trust instruments power is given to the trustees to retain the original investments of the trust or to postpone their sale, as a result of which they may hold for considerable periods investments which they would not be authorised to purchase. A change in the nature of an original investment will give rise to the question whether it is still covered by the power of retention under which it has been previously held, or whether it has become a new investment which, unless authorised under the terms of the trust or by statute, should be realised as soon as practicable. If a proposed change requires the concurrence of the trustees, there will also be the preliminary question whether they have power to concur. Problems of this kind occur most frequently in the case of schemes for the reconstruction or amalgamation of companies, but they may also arise in other connections.

Before the enactment of the Trustee Act, 1925, statute law was virtually silent on these matters, and the court has generally taken a fairly strict view as to the power of trustees to concur in schemes involving the conversion of investments, or to retain converted investments if not of an authorised nature. Where trustees held a share in a partnership as an original asset of a testator's estate, with power to postpone its realisation, it was held in *Re Crawshaw* (1888), 60 L.T. 357, and *Re Morrison* [1901] 1 Ch. 701, that they had no authority to take part in the formation of a limited company to take over the business, or to accept or retain shares in such company, and further, that the court had no power to sanction such a transaction. In *Re New* [1901] 2 Ch. 534, it was apparently assumed by all parties that trustees holding shares in a limited company as originally settled would similarly have no power on their own account to accept a scheme for reconstruction of the company, the only question being whether the court could empower them to do so. The Court of Appeal did in fact give leave on terms for the trustees to concur in the scheme, taking a rather broader view of the court's powers than had been taken in *Re Crawshaw* and *Re Morrison*. The decision of Buckley, J., in *Re Smith* [1902] 2 Ch. 667, registered further progress on the question of reconstruction, for here trustees who had already concurred in a scheme for reconstruction of a company were held to have acted rightly and to be entitled to retain the shares in the new company as being substantially identical with the original shares, which they had power to retain under their testator's will.

In *Re Anson* [1907] 2 Ch. 424, on the other hand, Kekewich, J., doubted the correctness of this decision, though his remarks were *obiter* only, for the case before him was of a different nature. Trustees held shares in a financial company with power to retain the same; the company reduced its capital, and by way of repayment to its shareholders distributed to them stock which it had held in certain railway companies. It was, of course, more difficult than in *Re Smith* to maintain that the railway stocks were virtually identical with the original shares, and Kekewich, J., held that, as they were unauthorised under the terms of the trust, they could not be retained. Apart from the decision in *Re Smith*, *supra*, on the question of reconstruction, there seems in fact to have been no general authority before 1926 enabling trustees to concur in schemes for the conversion of investments or to retain the converted investments where they were not otherwise authorised. It was even doubted for a time whether trustees could hold pure bonus shares as an addition to the original shares in respect of which they were issued; but in *Re Whitfield* [1920] W.N. 256, it was decided that they could do so, on the ground that their shareholding remained the same proportion of the company's capital as before.

Section 10 (3) of the Trustee Act, 1925, has now expanded trustees' powers and enables them to concur in schemes for the sale of assets to another company or for amalgamation, in addition to pure reconstruction schemes. Shortly it provides that trustees holding securities of a company may concur in any scheme (a) for reconstruction of the company, (b) for the

sale of all or any part of its property or undertaking to another company, (c) for its amalgamation with another company, and (d) for the release, modification or variation of any rights, privileges or liabilities attached to the securities, with power to accept any securities of the reconstructed purchasing or new company in lieu of or in exchange for the first mentioned securities and to retain such securities for any period for which they could properly have retained the original securities.

The operation of the subsection has certain obvious limits. It is clear that it would not cover such a case as that of *Re Anson*, *supra*, or any case where in the liquidation of a company shares in another company are distributed to the members, unless the liquidation is part of a scheme for reconstruction, or for the sale of assets to or amalgamation with such other company. Other limitations arise from the fact that s. 10 (3) only applies where in the first place trustees are holding securities of a company, and only enables them to accept, within its conditions, securities of another company. The term "securities" is not exhaustively defined in the Trustee Act, though of course it includes stocks and shares (s. 68 (13)), and the term "company" is not defined in the Act at all. But these terms could hardly apply to a share in a partnership, so that apparently the conversion of a partnership into an incorporated company is still unauthorised except in so far as it is provided for in the trust instrument. It may also be doubted whether a statutory public body is a company within the subsection, but the point is not often material, and when schemes corresponding to those mentioned in s. 10 (3) are carried out in respect of public bodies in this country, they are normally authorised specifically by some statute, public or private, which will usually contain a provision enabling trustees to hold the substituted security on the same trusts and subject to the same powers as the original security.

Another limitation on the operation of s. 10 (3) was established by the decision of the Court of Appeal in *Re Walker* [1935] Ch. 567, in which it was held that the word "amalgamation" in the subsection did not include a case where a new holding company was formed with the object of acquiring all the shares of several existing operating companies, the members of the latter being offered the new company's shares in exchange for their own. The main grounds for the decision were that, as is usual in schemes of this kind, the existing companies were to continue as separate entities and their assets were not to be transferred to the new company. The fact that several corporations would continue to exist side by side, with legally separate undertakings, was considered fatal to the claim that the scheme was an "amalgamation," although it was admitted that the word had no fixed legal meaning, and was used in a wider sense in the Finance Act, 1927, s. 55. Mergers by exchange of shares as in *Re Walker* are a popular mode of securing unified control of companies, and are frequently described as amalgamations in company circulars. It is perhaps a pity that they fall outside the ambit of s. 10 (3), for there seems to be no essential reason why trustees should not have authority to concur in such schemes if they may concur in those of the kinds covered by the subsection. When, as is often the case, a proposed merger by exchange of shares can be shown to be beneficial to the trust, trustees should have a fair prospect of success in an application to the court for leave under s. 57 of the Trustee Act to accept the exchange and retain the new shares, or simply for leave to retain if the scheme has already become compulsory under s. 209 of the Companies Act, 1948 (replacing s. 155 of the 1929 Act).

Heading (d) of s. 10 (3) should be wide enough to cover all usual forms of reorganisation of share capital, short of actual reconstruction, including, e.g., the conversion of preference shares as a class into ordinary shares. Whether it would include the conversion of loan into share capital may be more doubtful, in view of the fundamental difference between these two forms of capital. It is fairly clear, however, that this heading would only include conversions by way of a general

scheme or arrangement, applying to the whole of a class of shares or securities, and not mere options which individual holders may accept or decline, nor the common-form offer of a new security to holders of a maturing security as an alternative to redemption in cash. It may be said, incidentally, that the latter type of conversion, and options to exchange securities in general, are probably also outside the scope of

s. 10 (4), which, according to a widely held view, refers only to rights of subscribing for additional securities.

Trustees' problems relating to schemes for the conversion of securities are thus by no means at an end, and for several of the more familiar types of conversion they are still unassisted by statute.

H. B. W.

## PIGEON PIE

To those of us who read the stream of reports and Acts that nowadays beset the harassed practitioner, in an effort, too often unhappily in vain, to keep abreast of our rapidly developing law, it comes as a pleasant surprise to read a report of a simple, straightforward common-law case in tort. One feels rather as one does on meeting again, in somewhat changed circumstances, some childhood friend of many years ago. Here at least is a face we once knew well—though the memory may be blurred—and the chance meeting brings back to mind many things long since forgotten. How much more pleasant the surprise is when the subject-matter of the case is that very English bird, the homing pigeon, depends no doubt upon what view one takes of homing pigeons. One thing is certain: that, from at least the time of Bracton, Englishmen have been divided into those who view the bird as a form of vermin, eating, for its size, a quite appalling quantity of other peoples' corn, and those who would nurture it tenderly that it might race and work for man.

*Hamps v. Darby* (1948), 92 SOL. J. 541, was a case covering a number of fascinating points. The facts were simple. The plaintiff was a breeder of homing pigeons which he kept for racing, and it was his practice at certain times of the day to release these pigeons from his dovecote for exercise. One day, about midday, according to his custom, the plaintiff released nine of these pigeons. The pigeons in the course of their journey alighted on a field of the defendant and proceeded to feed on his peas. The defendant thereupon shot at the birds and killed four of them. A fifth was wounded but returned home. The plaintiff brought an action for damages for the destruction and injury to the pigeons, and in the county court he was awarded £200 damages. The defendant appealed, and in the Court of Appeal he based his case on two main contentions: first that there could be no property in homing pigeons when free, and that therefore the plaintiff could not sue for trespass, and secondly that even if he was wrong in his first contention the destruction and wounding of the birds were justified in that they were damaging his crops.

The court had little difficulty in dealing with the second of the defendant's points, for the case of *Cresswell v. Sirl* (1947), 91 SOL. J. 653, which had then only recently been decided, covered the facts neatly. It will be remembered that in that case a farmer shot a dog which had been chasing and barking at his in-lamb ewes, but which at the time that it was shot was not actually engaged in the attack on the ewes but was coming towards the farmer. Scott, L.J., who delivered judgment in that case, made it quite clear that the court had viewed the case as one of great importance, and he showed how the law had changed during the period of more than a hundred years which had elapsed since the last case of the shooting of dogs had been reported. At that time, in *Morris v. Nugent* (1836), 7 C. & P. 572, the shooting was held to be justified only if the attack was actually taking place at the time of the shooting. But Scott, L.J., showed that since then the principles which governed justification as a defence to an action for trespass to goods had been modified, so that the test now is whether there was such real and imminent danger to the defendant's property that he was entitled to act as he did and whether his acts were reasonably necessary, in the sense of being acts which a reasonable man would do to meet a real danger. Although, as he pointed out, this principle was laid down in a case in which the facts were far removed from the present case, nevertheless the principle applied to dog cases as much as to any other trespass to goods.

This being so, the court laid down that the rules of law that now apply in cases of this nature are as follows:—

(1) The onus of proof is upon the defendant to justify the preventive measure of shooting the attacking dogs.

(2) He has by proof to establish two propositions, but each proposition may be established in either of two ways:—

*Proposition No. 1.* That, at the time of shooting, the dog either (a) was actually . . . attacking the animals in question, or (b) if left at large, would renew the attack so that the animals would be left presently subject to real and imminent danger unless the renewal was prevented.

*Proposition No. 2.* That either (a) there was, in fact, no practicable means, other than shooting, of stopping the present attack or preventing such renewal, or (b) the defendant, having regard to all the circumstances in which he found himself, acted reasonably in regarding the shooting as necessary for the protection of the animals against attack or renewed attack.

Applying these propositions to the evidence before them in the case of the errant pigeons, the court held that the county court judge was quite right in finding that the defendant had not satisfactorily proved either part of proposition 2. He had not in fact shown that the only practicable method of dealing with the pigeons was to shoot them. In order to discharge his burden, in this particular case, he should at least have shown that a "warning shot" was ineffective in driving the pigeons away.

To turn now to the first and, perhaps, the more important point raised by the defendant in this case, as to whether or not property exists in homing pigeons when out of their dovecote and flying free, it is somewhat surprising to find that not even in antiquity—when the point might have been expected to have been decided in its obvious connection with the sport of falconry—has any reported case been decided directly on the point. In his effort to support the view that there is no property in homing pigeons when released from the dovecote, the defendant relied mainly on the opinions of three of the four judges who decided the old case of *Dewell v. Sanders* (1618), Cro. Jac. 490. These opinions, which are included in a note at the end of the report, are set out as being the opinions of Doderidge, Houghton and Croke, JJ. (the last-named being also the author of the report). They are to the effect that a tame pigeon when loose on the wing becomes *nullius in bonis*. Notwithstanding the antiquity of these opinions, the court decided that they did not truly represent the law, for the following reasons: first, because the opinions were *obiter* and strictly irrelevant to the point in issue in that case, which was whether the erection of a dovecote could amount to a nuisance; secondly, because in the Norman French report of the same case, to be found in 2 Roll. Rep. 3, which was cited by the plaintiff, it was clear that the opinions of Doderidge and Houghton, JJ., were subject to the important qualification that the neighbour's pigeons that come upon my land may only be killed if they are at the time doing damage. This left only Croke, J., the author of the English report, holding the view that property in the pigeons was lost when they were let free. One wonders whether perhaps Croke, J., was a farmer as well as a judge and harboured the animosity against pigeons that has already been mentioned. The defendant in *Hamps v. Darby* further argued that s. 23 of the Larceny Act, 1861 (which provides a special penalty to be inflicted on anyone who shall "unlawfully and wilfully kill, wound or take any house dove or pigeon under such circumstances as shall not amount to larceny at common

law"), showed that the Legislature had supposed that there could be no property in pigeons on the wing. This argument, too, was dismissed by the court, as they thought that the terms of the Act showed only that Parliament was in some doubt on the matter, but that in any case the question whether a bird is larcenable is wholly distinct from the question whether a right of property may subsist in it for the purposes of maintaining a civil action.

The defendant's arguments having been disposed of in this manner, it remained for the court to show why they took the opposite view, and this they did by adopting the views of Bracton, Blackstone and Holdsworth. The opinion expressed by all three writers was that the owner of the pigeons retained property in the pigeons so long as they in fact had the *animus revertendi*. Perhaps Blackstone summarises the matter with the greatest succinctness in his "Commentaries," vol. 11, p. 391. After drawing the distinction between animals *domitiae naturae* and animals *ferae naturae*, he goes on with reference to the latter: "These are no longer the property of a man than while they continue in

his keeping or actual possession; but if at any time they regain their natural liberty, his property instantly ceases, unless they have *animus revertendi*, which is only to be known by their usual custom of returning . . . the law therefore extends the possession further than the mere manual occupation, for my tame hawk that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property; for he hath *animus revertendi*." Sir William Holdsworth, in his "History of English Law," vol. 7, p. 489, observed that Brooke, J., in one of the year books pointed out that the fact that animals *ferae naturae* were not the subject of larceny did not prevent them being the subject of private ownership if they were in any way useful to mankind, "... for if I have a singing bird, though it be not pecuniarily profitable, yet it refreshes my spirits and gives me good health, which is a greater treasure than great riches."

Little did those luckless pigeons foresee when they turned aside to taste the tempting peas the full scope of the argument that would arise as a result of that "frolic of their own."

P. W. M.

## "RESIDENCE TOGETHER" AND "COHABITATION"

"MARRIED women orders," as they are commonly called, are made by courts of summary jurisdiction under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925. Such orders may include not only provision for the payment by the husband of maintenance for his wife up to a maximum of £2 a week, but also provision for the wife to have the custody of any or all of the children of the marriage until the age of sixteen years, and for the husband to pay a weekly sum not exceeding ten shillings a week for the maintenance of each of such children during the continuance of the custody order.

Subject to the expiration of the order relating to the children when they attain the age of sixteen, married women orders normally remain effective throughout the joint lives of the husband and wife, or until discharged by an order of the justices made upon fresh evidence.

To this general rule, however, there are two statutory exceptions, both of which have been recently considered by the High Court. These exceptions are contained in the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (4) and s. 2 (2) respectively.

Section 1 (4) reads as follows:—

"No order made under the principal Act [i.e., the Summary Jurisdiction (Married Women) Act, 1895] shall be enforceable and no liability shall accrue under any such order whilst the married woman with respect to whom the order was made resides with her husband, and any such order shall cease to have effect if for a period of three months after it is made the married woman continues to reside with her husband."

The effect of this subsection is that if, whilst the parties are residing together, an order is made in favour of the wife, that order, though perfectly valid in the meanwhile, cannot be enforced unless and until the residence of the parties together ceases; whilst they reside together no liability accrues, so that even if the parties later separate the wife cannot recover payments from her husband in respect of the period of residence together; and unless separation takes place within three months of the making of the order, the order itself becomes not merely unenforceable but completely ineffective.

*Evans v. Evans* (1947), 91 SOL. J. 664, is a recent decision on the meaning of the words "resides with" in s. 1 (4) of the 1925 Act. The facts were that the wife, having obtained a maintenance order against her husband on the ground of his desertion, one month later sought to recover "arrears" before the justices. After the maintenance order was made the wife continued to reside in the husband's house, where he also was residing, but the parties occupied different parts of the house and lived entirely separate lives; the husband

ordered the wife out of the house but she refused to go and, on his bolting the doors against her, she re-entered by a window. It was held by a majority of the court that the parties were "residing with" each other within the meaning of s. 1 (4), and that accordingly no arrears had accrued under the order.

It is instructive at this point to compare the decision of the court in the case of *Watson v. Tuckwell* (1947), 62 T.L.R. 634, to which Lord Goddard, C.J., made reference in *Evans v. Evans*. In *Watson v. Tuckwell* a married woman applied for a bastardy order under the Bastardy Laws Amendment Act, 1872, and it was necessary to show that she was a "single woman" within the meaning of the Bastardy Acts. The wife, having left her paramour, went to live at her mother's house, where her husband was a lodger. The parties lived separate existences, and the court held that the wife was a "single woman." The distinction between this case and *Evans v. Evans* is, as the Lord Chief Justice pointed out, that in *Watson v. Tuckwell* the parties, though living under the same roof, were not living in a house which belonged to either of them, whereas in *Evans v. Evans* the parties were living in the husband's house.

The second statutory exception referred to above arises under s. 2 (2) of the 1925 Act, the relevant part of which reads as follows:—

"Where a married woman with respect to whom an order has been made under the principal Act resumes cohabitation with her husband after living apart from him . . . the order shall cease to have effect on the resumption of such cohabitation . . ."

It should be observed that this subsection deals with circumstances entirely different from those to which s. 1 (4) applies. Section 1 (4) covers the case where the wife "continues to reside with" her husband; but s. 2 (2) applies where the wife, after having lived apart, "resumes cohabitation" with him.

In *Thomas v. Thomas* (1948), 92 SOL. J. 393, the wife, having obtained a maintenance order and lived apart from her husband, returned to his house and rented certain rooms there from him, continuing nevertheless to live an entirely separate life. The court held that whilst this state of affairs might, as in *Evans v. Evans*, amount to "residing with each other," it certainly did not amount to "cohabitation," and that therefore the wife's order of maintenance remained operative. The Lord Chief Justice, in the course of his judgment, went on to say: "Cohabitation does not necessarily depend on whether there is sexual intercourse between husband and wife. Cohabitation means living together as husband and wife . . . the wife rendering housewifely

duties to the husband and the husband cherishing and supporting his wife as a husband should."

It will be observed that both s. 1 (4) and s. 2 (2) provide that in the circumstances specified the order "shall cease to have effect"; in the result, therefore, the order expires without any formal discharge by the justices, although it is not unusual for the husband to apply for an order of discharge in order to complete his protection and avoid possible difficulties of proof later on.

Here it is convenient to mention that although there is power under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, to award custody of children to the wife and order maintenance up to 10s. a week for each child against the husband, it is common for the wife to issue concurrently a summons claiming custody of and maintenance for the children under the Guardianship of Infants Act, 1886, s. 5. This practice was officially approved by the High Court in *Re Kineth* [1947] Ch. 223; 91 SOL. J. 67, and has the advantages that the power to order maintenance is increased to £1 a week in respect of each child, the order may continue until the child attains the age of twenty-one years, and the court may make provision for access by the husband to the children.

Until recently, however, this procedure suffered a serious disadvantage, in that arrears of maintenance under the Act of 1886 were recoverable only as a civil debt; although

the matter was not entirely free from doubt, it was generally considered that this meant that arrears accruing more than six months before the issue of the complaint were not recoverable summarily at all. By s. 53 of the Children Act, 1948, however, arrears are now recoverable in the same way as arrears under affiliation orders and married women orders.

It would appear, therefore, that in all cases where a wife claims maintenance for herself against her husband under the Summary Jurisdiction Acts, 1895 to 1925, she should also issue a complaint under the Guardianship of Infants Act, 1886, in respect of the children under twenty-one years of age, if she wishes to have the custody of them and an order against her husband in respect of their maintenance.

Section 3 (3) of the Guardianship of Infants Act, 1925, which applies to orders for custody or maintenance of children made under the Act of 1886, is similar in its wording to s. 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, set out above, so that the principles laid down by the Court in *Evans v. Evans* and *Watson v. Tuckwell* apply to guardianship orders as well as to married women orders.

As has already been pointed out, in the circumstances mentioned above the orders become automatically of no effect; there are of course a number of other circumstances in which an order may be discharged by the court, but it is not within the scope of this article to deal with such cases. E. G. B. T.

## REPORT ON THE LAW OF DEFAMATION—II

THE Committee, in their examination of the defences of justification and fair comment, accept the criticism that the law has reached a condition of too refined and too technical development. They recommend an analogous reform in each case. In relation to justification, it is pointed out that although only the "sting" of the libel need be substantiated, nevertheless each separate and distinct allegation must be justified. "In this respect, we think that the existing case law has, in the course of its evolution, tended to encourage too close a dissection of each sentence, indeed of each phrase, in a defamatory statement and to overlook the real effect of the statement." The suggested alleviation of the defendant's burden is that he should only be required to prove "that so substantial a portion of the defamatory allegations are true as to lead the court to the view that any remaining allegation which has not been proved to be true does not add appreciably to the injury to the plaintiff's reputation."

The uncertainty of distinction between fact and comment lends a further complication to the defence of fair comment. But here again the Committee are unwilling to leave defendants under the necessity literally and completely to substantiate the facts upon which the comment is based. In the sphere of procedure it is recommended that defendants should have to plead particulars of such facts. But in the sphere of substantive law, "So long as the gist or sting of any defamatory facts stated is true, and the comment is 'fair,' we think that the defence ought to succeed." Again, the test adopted by the ultimate recommendation is whether the residue of unsubstantiated defamatory fact "adds materially to the injury to the plaintiff's reputation."

Few will contest the Committee's premises, but whether this failure of the existing law to do substantial justice in all cases can be remedied by such a legislative amendment as is suggested is debatable. It is even open to doubt whether legislative intervention here is possible without producing greater evils than those it seeks to cure. It is easy to forget the limitations which inevitably circumscribe any attempt to give an abstract definition of a principle of law in precise terms. However minutely the law may state its rules, there will always remain large fields of controversy where the ultimate appeal must be to rules not of law but of good sense. Now when a rule of law, stated in more or less general terms, represents a satisfactory statement of principle, the fact that a series of reported cases, purporting to apply the rule, has led to undesirable results, can only mean either that the courts

have been mistaken in their application of the rule or that juries have failed to understand their directions. To attempt to offset this tendency by a re-statement of the rule itself is to open the door to novel difficulties of another and graver kind.

General statements of the present law of justification are quite unobjectionable. What could be more reasonable than that a defendant who seeks to justify should be required to substantiate the "gist" or "sting"—so much and no more—of his defamatory words? And, in principle, if the libel contain a number of quite separate accusations, it would seem eminently proper that each one should require to be separately justified. But if, to correct a current tendency to apply those rules over-strictly against defendants, there is to be superimposed on the existing law a statutory rule embodying the Committee's recommendation, the new law will rest on a totally different principle. Some construction must necessarily be given to the statute to distinguish it from the existing rule that only the gist of the libel need be justified. It is difficult to see by what subtle ingenuity the courts will be able to stop short of a complete abandonment of the rule that a libel containing diverse accusations must be treated as a number of separate libels. How, then, will the law stand? Suppose X, a city gentleman, has twice been convicted of serious frauds. So long as Y is careful to give an accurate account of this part of X's history, will he also be at liberty to brand X as a drunkard? Some juries might be disposed to think that, in comparison with the matter of the fraud, X's reputation will suffer no "material" or "appreciable" injury from the charge of drunkenness. No doubt cases of this kind will be exceptional and no doubt also, in the majority of such exceptional cases, the good sense of juries—who will inevitably be left with a wide discretion—will prevent any serious miscarriage of justice. But despite these limitations on the scope of the criticism, it will be no light matter for the law, even to this extent, to withdraw its protection from dogs with bad names.

In the realm of practice and procedure the Committee have turned attention to a number of anomalies and their recommendations will bring a welcome rationalisation. As is pointed out in the introduction to the Report, the majority of those who testified before the Committee, both individuals and organisations, represented the interests of potential defendants. The potential plaintiff in defamation is, in the nature of things, unable to speak for himself, and it is plain

from every line of the Report that the Committee, conscious of this discrepancy, have watched his interest with scrupulous care. But it is noticeable in the pages on practice and procedure that the positive recommendations, on balance, will tend to enhance the defendant's rather than the plaintiff's tactical position.

Greater particularity in pleading is to be required of both sides. The plaintiff pleading an innuendo must particularise the extraneous facts, known to the persons to whom his words were published, from which the innuendo is to be inferred. The defendant pleading fair comment must, as already noted, set out the facts upon which the comment was based. Again, a plaintiff seeking to defeat a defence of fair comment or privilege with a plea of express malice must give particulars of any extraneous facts from which the inference of malice is to be drawn. These recommendations will go far to minimise the element of speculation and uncertainty in actions of defamation, and enable practitioners to advise at an early stage, on the issue of liability, with a far greater measure of confidence than hitherto. At the same time, on the issue of damages, a stabilising factor will be the recommended extension of the powers of the Court of Appeal to vary the amount of a jury's award. When experience of the exercise of the new power has afforded a sufficient guide to the Court of Appeal's quantum "valuation" of different kinds of cases, plaintiffs will no doubt be anxious to accept a compromise figure rather than risk incurring the costs of an appeal in trying to uphold a jury's extravagant award. But in the early stages of its operation some apprehension will be felt

that the benefit of this reform will be offset by its general tendency to increase the cost of litigation.

On the subject of costs in general the Report is full of illuminating comment but contains no recommendation of change. The publishing community are not unnaturally exercised over the problem of the "gold-digging" plaintiff who, in the event of failure, will be unable to meet the defendant's costs. "We do not suggest," say the Committee, "that 'gold-digging' actions are unknown or even extremely rare; but so long as the courts are freely open to those who allege that they have suffered a legal injury, the problem of the 'gold-digging' plaintiff must remain. It is by no means restricted to actions for defamation. It arises in many types of action. But the general law and practice must be based upon the assumption that litigants are honest and reputable—as the great majority are—and the rights of the majority should not be curtailed because they may be misused by a limited number of persons."

The suggestion of more stringent provisions requiring plaintiffs to give security for costs is resisted, and the Committee refuse to recommend that county courts be given original jurisdiction.

To those who have contended that actions for defamation are entitled to special consideration in respect of general reduction of costs, the Committee's effective answer is that the figures of taxed costs which have been examined "indicate no noticeable difference between the costs of actions for defamation and other actions of comparable importance."

N.C.B.

## Company Law and Practice

### EXEMPT PRIVATE COMPANIES—II

THE conditions which require to be satisfied in order that a private company may qualify as an exempt private company are—

- (a) that the number of debenture-holders (joint holders being treated as a single person) is not more than fifty; and
- (b) that no body corporate is a director and that neither the company nor any of the directors is party or privy to any arrangement whereby the policy of the company is capable of being determined by persons other than the directors, members and debenture-holders (or trustees for debenture-holders); and
- (c) that the conditions in Sched. VII are satisfied.

The conditions in Sched. VII are two in number and both are simple, but these two conditions are subject to a number of exceptions which require careful scrutiny. The two basic conditions are—

- (a) that no body corporate is the holder of any shares or debentures; and
- (b) that no person other than the holder has any interest in any of the shares or debentures.

The second of these two basic conditions is particularly important, since it relates to matters in respect of which the company need have no knowledge. It should be noted that it is not apparently necessary, where there are joint holders, that all the joint holders should have an interest in the shares or debentures concerned; the holding by the beneficial owner jointly with a nominee for him does not infringe the second basic condition, even if the nominee is the first-named holder.

The exceptions to the two basic conditions are defined in Sched. VII in great detail, and it is not possible within the scope of this article to deal with them fully. The summary below of these exceptions must be treated as such and, since no summary can be both comprehensive and accurate in all detail, reference must be made to the Act itself to ascertain whether or not any particular holding or interest is within the permitted exceptions. The exceptions are dealt with below under their respective headings, references to "holding" appertaining to the first basic condition and references to "interest" appertaining to the second,

Sched. VII.  
para.  
2 (2)

#### *Normal dealings of a business nature*

- (1) The holding or interest of a banking or finance company arising under a charge by way of security for the purposes of a transaction in the ordinary course of its business is to be disregarded, except that the holding is to be attributed to the person entitled to the equity of redemption (whether there is a present right to redeem or not).
- (2) Any interest under a contract for transfer is to be disregarded until execution of the transfer, unless such execution is unreasonably delayed.
- (3) On execution of a transfer the transferee is to be treated as the holder (notwithstanding that registration of the transfer may be necessary) unless and until registration is refused. (N.B.—There is no provision as to the time within which the transfer must be presented for registration, and it seems that a transfer can be executed and put into cold storage indefinitely without the operation of the above exception being affected.)
- (4) Any interest of the company itself is to be disregarded.
- (5) Any lien or charge arising by operation of law is to be disregarded.

#### *Cases of death—family settlements*

- 3 (1) (a) (6) A holding or interest arising on death is to be disregarded, so long as administration of the estate remains uncompleted.
- 3 (1) (b) (7) A holding by trustees under the trusts of a will or family settlement disposing of the shares or debentures concerned, and any interest arising thereunder, is to be disregarded (except that the interest of a body corporate is not to be disregarded unless the body corporate is one established for charitable purposes only and having no voting rights in the company, or unless the interest of the body corporate is only by way of remuneration for acting as a trustee), and, for the purpose of the

Sched. VII.  
para.

- 3 (1) (b) foregoing, shares or debentures forming part of an intestate's estate at the date of his death shall, so long as they are held upon the trusts arising upon the intestacy, be treated as if the trusts arose under a will disposing of the shares or debentures concerned. (N.B.—Shares or debentures purchased or otherwise acquired by trustees will not come within the above exception, since the will (or family settlement) is not one disposing of such shares or debentures. It is suggested that shares acquired by trustees as an accretion (e.g., as a result of a bonus issue) to an existing holding, and (possibly) shares into which an existing holding may be converted consequent upon a scheme of reconstruction or amalgamation, may be treated as representing (or counting with) the existing holding for the purpose of the above exception; it should not be assumed, however, that this is the case and careful consideration would be necessary before advising on any specific instance).

#### Disability

- 4 (8) The holding or interest of an administrator, *curator bonis*, etc., of a person of unsound mind or under a disability and the holding or interest of the person concerned are to be regarded as coincidental, the two being treated as the same person. (N.B.—The effect is as if the administrator, etc., and the person concerned were joint holders.)

#### Trusts for employees

- 5 (9) The holding by trustees of a trust for the benefit of employees (including salaried directors), and any interest arising under such trusts, is to be disregarded.

#### Shares held by exempt private companies

- 6 (10) The holding of shares by another exempt private company is to be disregarded, provided that the number of shareholders in all the companies to be taken into account does not exceed a total of fifty, joint holders being treated as a single person, and the companies, their employees and ex-employees (being persons who held shares in the company concerned during their employment and have continued to hold shares therein) being excluded from the total. The companies to be taken into account are—

(a) the company whose exemption is in question ("the relevant company"); and

(b) any company holding shares to which the above exception has to be applied in determining the relevant company's right to be treated as an exempt private company; and

(c) any company to be taken into account in determining whether any company in (b) above has itself the right to be treated as an exempt private company.

(N.B.—Where there are cross-holdings of shares between two or more companies it may be impossible to determine under the above rules whether any of the companies are exempt without knowing whether the others are exempt. Paragraph 6 (2) contains provisions for solving such a problem.)

- 6 (3) (11) Any interest in shares, the holding of which is to be disregarded by virtue of (10) above, is to be disregarded where the interest arises by virtue of debentures of the company holding those shares or of a trust deed securing such debentures.

Sched. VII.

para.

7 (1)

#### Banking or finance company providing capital

(12) The holding of a banking or finance company (or its nominee) is to be disregarded where the banking or finance company acquired the shares or debentures concerned in the ordinary course of its business as such and by arrangement with the relevant company or its promoters. (N.B.—This exception does not apply if the banking or finance company (or, if more than one such company has to be taken into account, all of such companies) has (or together have) the right to exercise or control the exercise of one-fifth or more of the total voting power at any general meeting of the relevant company.)

7 (2)

(13) Any interest in shares or debentures, the holding of which is to be disregarded by virtue of (12), above, is to be disregarded where the interest arises by virtue of debentures of the banking or finance company concerned or of a trust deed securing such debentures. Where the shares or debentures concerned are held by its nominee, the interest of the banking or finance company itself is also to be disregarded.

#### Bankruptcies, liquidations, etc.

8

(14) Any holding or interest arising under a bankruptcy or liquidation, or a trust for the benefit of creditors generally, or a composition or scheme of arrangement made or approved under any Act by a court or an officer of a court, is to be disregarded.

The following definitions should be borne in mind in considering the provisions of Sched. VII:—

(a) *Banking or finance company*.—Any body corporate or partnership whose ordinary business includes the business of banking; and any other body corporate whose ordinary business includes the business of lending money or of subscribing for shares or debentures, and whose shares are quoted or dealt in on a recognised stock exchange (as defined in the Prevention of Fraud (Investments) Act, 1939) or which is designated for the purposes of Sched. VII by order of the Board of Trade or is a subsidiary of a body corporate whose shares are so quoted or dealt in or which is so designated.

(b) *Will*.—Any testamentary disposition.

(c) *Family settlement*.—A settlement made in consideration or contemplation of an intended marriage of the settlor or any of his issue or in pursuance of a contract so made; or a settlement made in favour of the settlor, certain specified relations, members (and, in the case of a settlement of debentures, debenture-holders) of the company, and specified relations of such members (and debenture-holders, where applicable), or any of such persons. (N.B.—The full definition, which requires careful study, is contained in para. 3 (2) of Sched. VII.)

It should be observed that none of the exceptions referring to banking or finance companies (Nos. (1), (12) and (13) above) applies to the ordinary case of an individual holding shares through the nominee company of a bank; and that the exceptions referring to other exempt private companies (Nos. (10) and (11) above) do not apply to another exempt private company holding through a nominee. Where a private company is the wholly-owned subsidiary of an exempt private company, difficulties may arise as to the exemption of the subsidiary owing to the fact that the subsidiary must have at least two members. If any of the shares of the subsidiary are held by a nominee the second of the two basic conditions is not satisfied, but it appears that it is satisfied if they are held by a nominee jointly with the parent company.

J. W. M.

The Union Society of London, which meets in the Barristers' Refreshment Room, Lincoln's Inn, at 7.45 p.m., announces the following subjects for debate in November, 1948: Wednesday, 10th November, "That the Irish cannot have it both ways";

Wednesday, 17th November, "That Communists should no longer be allowed to hold responsible posts in this country"; Wednesday, 24th November, "That Spain should be admitted to the comity of Western Europe."

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*A Conveyancer's Diary*

## COVENANTS OF INDEMNITY AGAINST ROAD CHARGES

COVENANTS of indemnity against road charges are very commonly entered into on the sale of premises forming part of a newly developed building estate. These covenants take many forms, and it is not always easy to see at first glance whether their enforceability has been affected by intermediate dealings with the premises. Such a case has recently been communicated to me by a correspondent.

The house in this case was on a building estate and the carriageway of the road had been made up by the builders when the present vendor purchased the house. But the footway had not been made up, and if the road were to be adopted by the local authority at some time charges would become payable in respect of the footway, and possibly also in respect of works necessary to bring the carriageway up to the standard specified by the local authority. The contract between the builder and the present vendor was on a "no road charges" basis, and provided for an indemnity whereby the builder covenanted to indemnify the present vendor and his estate and effects from and against any moneys which might become payable to the local authority in respect of the premises upon the taking over, or making up and taking over, of the road by the authority. It was also stipulated that this provision should continue in operation notwithstanding the transfer to the present vendor of the property sold, but there was nothing in the contract of sale to indicate that the expression "purchaser" (the expression used in the contract to designate the present vendor) included his successors in title.

The road had not been adopted by the authority when the present vendor agreed to sell the house to the present purchaser, and the question raised by my correspondent was whether the benefit of the covenant for indemnity contained in the original contract of sale (and presumably reproduced in the conveyance giving effect to that contract) was purely personal to the present vendor, or whether the benefit of this covenant could be assigned to the present purchaser.

There is no direct authority on the point, but I have always considered it covered by the decision in *Dyson v. Forster* [1909] A.C. 98. In that case the covenant was one to pay compensation for damage caused by the working of minerals entered into by a mining lessee with his lessors (who were not the owners of the surface) and with other the owners and occupiers for the time being of the surface. The parties to the lease containing this covenant were the lessee and the lessors only, but it was held that an assign of the surface owner was entitled to enforce the covenant against the personal representatives of the lessee. The objection that the surface owners were not parties to the covenant was met by s. 5 of the Real Property Act, 1845. This section is now replaced by s. 78 of the Law of Property Act, 1925, which provides that a covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title, and shall have effect as if such successors were expressed.

In order to take advantage of this provision the covenant must relate to land of the covenantee. This is a vague expression, but in *Dyson v. Forster*, *supra*, it was held that the covenant there ran with the land and was not simply a collateral covenant. The test in regard to this vital question, as Lord Macnaghten put it, was whether the covenant affected the nature, quality or value of the land, and he considered that the covenant in that case affected both the nature and the value of the land. It is submitted that this test still

holds good, and for this reason it is important to bear in mind the use of the disjunctive "or" by Lord Macnaghten. A covenant of indemnity against road charges clearly affects the value of the land, and that being so it is a covenant which runs with the land within the principle of *Dyson v. Forster*, *supra*. It is also clearly a covenant which relates to the land of the covenantee, whatever the precise meaning of that expression may be.

The answer to my correspondent's problem would be, therefore, that the covenant in question is not a collateral or personal covenant, and the benefit would pass to the present purchaser without an express assignment, notwithstanding the fact that on the face of it the covenant is not expressed as made with the present vendor's successors in title. But I see no reason why the benefit of a covenant, even if it is one which runs with the land, should not be expressly assigned on the principle of *South Eastern Railway v. Associated Portland Cement Manufacturers* [1910] 1 Ch. 12; and although an express assignment is unnecessary in a simple case, circumstances may arise to make an assignment essential, e.g., where the premises are sub-divided on sale after the date of the original covenant (see *Re Ballard's Conveyance* [1937] Ch. 473).

This really ends the matter, but my correspondent raised a further question, viz., whether (on the assumption that the present purchaser would not be entitled to the benefit of the covenant) the present purchaser could take an effective indemnity from the present vendor in terms similar to those of the original covenant. I can see nothing in principle to prevent such an indemnity being effective, even though the covenantor must *ex hypothesi* have parted with the land, and would not himself be liable to any charge in respect of the road, at the time when the present purchaser would seek to enforce the covenant of indemnity. Covenants for title are enforced in such circumstances and, indeed, the insertion of covenants for title in assurances of land would be ineffective, or at least impracticable, if the covenants did not form a complete chain of indemnity, protecting each party in his turn.

\* \* \* \* \*

However effective covenants of indemnity against road charges may be in law, there is always a risk that for some reason (such as the bankruptcy of the covenantor) they may become worthless in practice. To provide against the possibility of a purchaser, who has already paid an enhanced price for his land on account of an indemnity against road charges, being called upon to pay these charges again out of his own pocket, the Birmingham Corporation have secured the insertion of a novel and useful clause in the Birmingham Corporation Act, 1948. Section 26 provides that any owner of land adjoining a street, which is not a highway repairable by the inhabitants, who agrees to sell such land on terms which include a provision that he will pay road-making charges to the corporation, shall deposit with the corporation, or otherwise secure the payment of, a sum sufficient to meet the charges. "Sell" for this purpose includes the grant or assignment of a lease for an unexpired term of not less than fifty years at a premium and the transfer of the benefit of an agreement to grant such a lease; and there is a penalty for non-compliance.

This is an excellent provision, and the more publicity that is given to it the more likely will it be that other local authorities will follow suit when an opportunity presents itself of promoting local legislation.

"A B C"

By the Companies (Stock Exchange) (No. 2) Order, 1948 (S.I. 1948 No. 2340), which came into operation on 27th October, 1948, the Board of Trade prescribe that, for the purposes of ss. 39 and 418 of the Companies Act, 1948, the stock exchanges at Birmingham, Edinburgh, Glasgow, Liverpool and Manchester shall be prescribed stock exchanges, and, for the purposes of ss. 38 and 417 of that Act, the said stock exchanges and also the

stock exchanges at Bristol, Cardiff, Newcastle and Sheffield shall be prescribed stock exchanges.

A meeting of the United Law Society was held in the Barristers' Refreshment Room, Lincoln's Inn, on Monday, 25th October. Mr. O. T. Hill was in the chair. The motion "That the Government has badly mismanaged the food supplies of this country" was defeated by one vote.

Landlord and Tenant Notebook

## NATIONALISATION AND DECONTROL

NOT long ago, a magistrate was called upon to deal with a novel defence to a charge of trespassing on a railway line: namely, that as a result of the Transport Act, 1947, that offence had ceased to exist. The court found itself unable to agree with this contention, which, incidentally, seems to have ignored the fact that those cases in which trespass is a criminal matter include many in which the land concerned is Crown property.

But that the statute referred to has brought about modifications of rights other than those which were its immediate concern follows from a decision of His Honour Judge Scobell Armstrong in Plymouth County Court on 28th October, briefly mentioned in *The Times* of the following day, in which the learned judge held that a dwelling-house owned by the railway companies before the passing of the Act had become decontrolled. The possibility of such a decision was foreshadowed in the "Notebook" of 21st August last (92 SOL. J. 467), when, writing on "Rent Restriction: The Crown," I suggested that the issue would depend on whether the Transport Commission was a direct emanation from the Crown acting in pursuit of a purpose of the Crown. His Honour Judge Scobell Armstrong has held, in his judgment on a preliminary point of law of which I have been kindly lent a copy, that it is.

The case was one in which a tenant of a house which was transferred by the Act sought possession against a sub-tenant, and it is of interest that the British Transport Commission have since issued a statement to the Press in which they not only emphasise the fact that neither they nor the Railway Executive were parties to the proceeding but also state that they have not pleaded that they are entitled to Crown privilege in relation to their property.

But, the Increase of Rent, etc., Restrictions Acts operating *in rem* (there was no argument about or on this), the vital question was whether the British Transport Commission owned the dwelling-house independently of the Crown or as agents of the latter: this is stated in the judgment at the outset, and it would appear that the "as agents" was intended to represent the "acting in pursuit of Crown purposes" of *London Territorial and Auxiliary Forces Association v. Nichols* (1948), 92 SOL. J. 455, cited by His Honour. The learned judge went on to observe that actual ownership was what mattered; the fact that other immunities, such as liability to be sued, were not available to the Railway Commission (a body corporate: Sched. I) was unimportant, merely putting them in the same position as regards proceedings as the defendants in *Graham v. Public Works and Buildings Commissioners* [1901] 2 K.B. 781—officials established as agents of the Crown, but with the power of contracting as principals, in order that those who contracted with the Crown for business purposes should have the same power of appealing to the courts of justice against misconstruction of the contract as any subject might have against his fellow-subjects. It was true that in that case a judgment could be satisfied only out of moneys provided by Parliament, while in the case of the Transport Commission it would be satisfied out of receipts and profits: but these were not the receipts of a private concern; they were receipts of the State, of the whole community, and this was tantamount to saying that they now belonged to the Crown.

The Transport Act, 1947, did not furnish any clear light, the judgment proceeded; but what was clear was that the

Commission's activities were controlled by a Minister of the Crown; not only were salaries "subject to the Treasury" (by s. 1 (7) they are determined by the Minister with the approval of the Treasury), but s. 4 (5) authorised the Minister of Transport to order the Commission to dispose of any part of their undertaking. It seemed impossible to hold that the Commission in administering this nationalised undertaking did so otherwise than as servants of the Crown under and through its Minister appointed to control them.

The last point dealt with in the judgment was an argument based on s. 14 (2) of the Act, by which liabilities of the undertaking were transferred to the Commission. But to say that these included a liability to the restrictions imposed by the Increase of Rent, etc., Restrictions Acts, would, in His Honour's view, be overstraining the word "liabilities." (Possibly the same would be said, *mutatis mutandis*, if the Commission had sought to disclaim tenancy agreements under s. 15.) The probability was that the Legislature had overlooked the Rent Acts altogether; the immunity of the Crown could not be thus inferentially curtailed; express words were necessary, such as those of s. 33 of the Workmen's Compensation Act, excluding persons in the Army, Navy, or Air Force, but otherwise applying it to workmen employed by or under the Crown.

The learned judge concluded with an expression of diffidence, having regard to the far-reaching consequences that must ensue if the conclusion reached was correct; and it may well be that His Honour had in mind the fact that railways are not the only undertakings nationalised, though others which have been taken over are, perhaps, less given to owning dwelling-houses.

It is just possible that the functions of the British Transport Commission could be contrasted with rather than compared to those of the London Territorial, etc., Association, which, in the case cited, recovered possession of a flat let by itself when redundant; but I would suggest that more might perhaps be made, in an action between mesne tenant and sub-tenant, of the possibility of a distinction between such a case and those in which the divinity which doth hedge a king has been held to extend to those deriving title through him. In *Clark v. Downes* (1931), 145 L.T. 20, and more recently in *Rudler v. Franks* [1947] K.B. 530, a purchaser from and a lessee of the Crown (who had sublet a cottage) were held to be entitled to possession against their tenants though the premises claimed were within the Rent Acts; but in each case the judgments were founded, partly at least, on the consideration that the immunity had enhanced the value of the Crown's reversion. This feature would, as it were, be reflected in the purchase price paid in the one case, and the head rent reserved in the other. In *Tamlin v. Hannaford*, the recent case at Plymouth, the position was the other way round; and there was no authority to show that acquisition of freehold by the Crown not only decontrols any existing tenancy granted by the Crown's predecessor in title, but also any sub-tenancy in being at the date of the acquisition. If the Press statement referred to earlier may be taken to imply an intention on the part of the Commission (who are authorised to provide houses for their employees: s. 2 (2) (d)) never to plead Crown privilege, the value of sub-tenants' interests has depreciated in a way not entitling them to compensation under s. 16 of the Transport Act, 1947.

R. B.

## PARLIAMENTARY FIREWORKS

FOR some weeks past the streets of the metropolis have presented a strange spectacle. Scores of small urchins, with blackened faces, and wearing fantastic clothes, have been importuning us as we pass by, drawing our unwilling attention to their own garb or to strangely dressed effigies they carry and entreating us to "remember the guy." By Friday, the 5th November, this

protracted carnival period will have culminated in displays, in thousands of back gardens, of fireworks purchased out of the pennies thus assiduously collected. These festivities celebrate the three hundred and forty-fourth anniversary of the Gunpowder Plot of 1604, when Robert Catesby and his fellow-conspirators, Sir Everard Digby and Francis Tresham, planned to blow up

King James I and his Parliament with barrels of gunpowder stored in the cellars beneath the House. It is curious that the most obscure of the persons in the plot, the soldier Guido (*anglice*, Guy) Fawkes, should be the one character whose name and fame have survived in the memories of those young people who annually celebrate the country's deliverance from this peril. Fawkes appears to have had little part in the proceedings except to stand guard in custody of the explosive barrels.

The plot had followed a re-enactment of the penal laws against the Catholics, and a link with the present day is to be found in the recent inclusion, among the statutes partly repealed by the Statute Law Revision Act, 1948, of the Statute 3 Jac. 1, c. 5, intitled "An Acte to prevente and avoid dangers which may grow by Popish Recusantes." But James on his accession was assailed by other and more numerous dangers, most of which arose out of his unpopularity with Parliament and people. Following the great Elizabeth, he had an ungrateful task, and his personal qualities of pedantry, conceit and general buffoonery contrasted ill with the qualities of the beloved Queen who preceded him. He would doubtless have been as unpopular to-day, for one of his best known literary works, entitled "A Counterblaste to Tobacco," is a virulent attack, on material and moral grounds, on the then growing practice of smoking, which had been recently introduced by the ill-fated Sir Walter Raleigh.

Be that as it may, the discovery of the Gunpowder Plot proved as useful to James and his Government as did the Reichstag fire to Hitler in 1933, and repressive measures against the Catholic community were accepted as inevitable in the wave of public horror and indignation which followed the discovery of the conspiracy.

To a present-day public, inured to the practice of political controversy as a matter of expletives rather than explosives, the

methods adopted by Catesby and his followers may seem a little crude. Motions of censure in the House have taken the place of the more direct and forceful argument of barrels of gunpowder beneath it. The printing press is the principal weapon in the armoury of politicians, and an indignant letter to *The Times* may now do more to call attention to abuses than would the lethal instruments of the political assassin.

It is true to say that some of the ingredients of the Government's recently introduced legislation—the Parliament Bill and the Steel Bill, for example—have formed a highly explosive mixture; and on the other side the pronouncements of some of the Opposition, inside and outside the House, have seemed to breathe fire and slaughter. But it is a happy characteristic of our political system that, when the reek and smoke of battle have died away, the clash of controversy is usually found to have produced no major casualties; even at election-time the only damages to the protagonists appear to be those awarded by the King's Bench Division in an occasional action for defamation. All this makes political life rather like membership of a Ruritanian army, picturesque and exciting, but not really dangerous. The sole disadvantage consists in the saddening thought that the thunder of denunciation in a memorable leading article, or a devastating speech, is unlikely to be celebrated by the younger generation three centuries hence with the flattering glamour that now surrounds the memory of the unfortunate Guido Fawkes.

A learned but apocryphal work on English History, popular in the nineteen-thirties, described the Civil War in the reign of James's successor as having been fought between "the Roundheads, who were right but repulsive, and the Cavaliers, who were wrong but romantic." What sober and law-abiding citizen has not in his boyhood imaginings applied the same respective descriptions to James and Guy?

A. L. P.

## REVIEWS

**Macgillivray on Insurance Law.** Third Edition. By E. J. MACGILLIVRAY, K.C., LL.B., Member of the Faculty of Advocates, Scotland, and DENIS BROWNE, M.A., of Lincoln's Inn, Barrister-at-Law. 1947. London: Sweet & Maxwell, Ltd. 147s. net.

Earlier editions have established the work as the most authoritative on the subject, and the latest edition, which brings it up to date, will confirm and extend its reputation.

The law of fire and accident insurance as well as that of the life branches is dealt with. It is convenient to have this in one volume, and it saves a lot of time to have, easily accessible, all the relevant law comprehensively stated.

There are numerous sections to which frequent reference is bound to be made in daily practice: those dealing with titles to life assurance policies and the section on presumption of death, for example. Sections such as these are masterly and of great practical value.

A special comment must be made on the publishers' notice in the book. This notice draws attention to the service available to keep the edition up to date by means of supplements, for which a pocket is provided in the back cover. The value of this service can be illustrated by the drastic changes in industrial life assurance law since the book was published. The Industrial Assurance and Friendly Societies Act, 1948, brought important changes into force on 5th July, 1948, and provides for further alterations from 5th July, 1949.

**Turner's Index to the Companies Act, 1948.** By C. W. TURNER, of Lincoln's Inn, Barrister-at-Law, assisted by P. GARDINER, LL.B. 1948. London: The Solicitors' Law Stationery Society, Ltd. 15s. net.

A copy of the Companies Act, 1948, is an essential part of the working equipment of every practitioner concerned in company law, but by itself it does not suffice. The short section titles of the Act may enable one to locate quickly the main section concerned, but cannot satisfactorily indicate the full list of sections or sub-sections relevant to any particular matter. How easy it is, for example, to read s. 191 without realising that s. 194 (3) expressly excludes from the operation of s. 191 any *bona fide* payment by way of pension in respect of past services. To provide a rapid and at the same time complete reference to the Act it is essential to have a really full index from which one can not only

obtain the necessary cross-references, but also ensure that no relevant provisions are ignored. The publication under review comprises a King's Printer's copy of the Act, a full and practical index of over 100 pages, and tables of comparative sections giving a quick and easy cross-reference between provisions of the old law and the new. The index is comprehensive, and one particularly valuable heading is "Definitions" which covers about three and a half pages and gives the necessary section references to well over a hundred phrases defined in the Act.

**The Special Contribution or Capital Levy under the Finance Act, 1948.** By J. H. MUNKMAN, LL.B., Barrister-at-Law. 1948. London: The Solicitors' Law Stationery Society, Ltd. 3s.6d. net.

This little book sets out in very clear language the principles and the details of the special contribution which has now been demanded from sur-tax payers. There are chapters on Liability, Total Income, Aggregate Investment Income, Husband and Wife, Companies, Income from Trusts, Incidence between Beneficiaries, Domicile and Residence, Assessment and Collection and Appeals. There are also numerous worked examples. The book is well written and attractive in style. It will be found of the utmost value to any office that has to deal with the incidence of the contribution. The author had the assistance of Mr. Kenneth Child, A.C.A., in revising the typescript and in checking the figures.

**Taylor's Principles and Practice of Medical Jurisprudence.** Vol. 1. Tenth Edition. Edited by SYDNEY SMITH, C.B.E., M.D. (Edin.), F.R.C.P. (Edin.), D.P.H., Regius Professor of Forensic Medicine, University of Edinburgh. Revised by W. G. H. COOK, LL.D., M.Sc. (Econ.) (Lond.), of the Middle Temple and Western Circuit, Barrister-at-Law, and C. P. STEWART, Ph.D., M.Sc. 1948. London: J. & A. Churchill, Ltd. 45s. net.

This volume is, perhaps, of more interest to the doctor than the lawyer, but, although it abounds in purely medical terms, the layman will have no difficulty in understanding it. It is, in fact, medicine discussed so as to be intelligible to the lawyer and law written for the doctor. Volume I deals principally with causes of death, wounds and identification of persons alive and dead, and, apart from its very obvious value to the lawyer whose practice includes criminal law, it will be of endless interest to all who study criminology.

On his retirement from the post of Senior District Registrar of the High Court and Registrar of County Court, Birmingham, Mr. FRANK GLANVIL GLANFIELD, LL.B., was given a public farewell in the presence of Judges Forbes and Norris. Judges

Dale and Tucker sent letters of appreciation. Mr. A. R. Churchill voiced the good wishes of the Bar, and the President of the Birmingham Law Society (Mr. J. F. Crowder) spoke on behalf of the solicitors. Mr. Glanfield has been Registrar since 1925.

## NOTES OF CASES

## HOUSE OF LORDS

## LEAKING WATER MAIN: LOOSE PAVING-STONES

## Longhurst v. Metropolitan Water Board

Lord Porter, Lord Uthwatt, Lord du Parc, Lord Normand and Lord Morton of Henryton. 29th October, 1948

Appeal from the Court of Appeal ((1947), 91 Sol. J. 653).

While the plaintiff was walking on the public pavement outside her house at Dartford on 5th July, 1945, a paving-stone on which she trod, being loose, tipped downwards, leaving the next stone projecting an inch above it. She tripped against that projection, fell, and was injured. The paving-stone was loose because of a leak in a stopcock, belonging to the defendant board, situated some yards farther up the pavement and at a higher level. Water from the leak, flowing downwards along the pavement, had caused several flagstones to become loose in their seatings. Having remedied the leak and replaced the six flagstones which they had had to remove for that purpose, which did not include the stones on which the plaintiff fell, the board had, on 4th July, in accordance with the usual practice, notified Dartford Corporation, as the highway authority, that the stones which the board had removed required permanent reinstatement. The corporation duly received that notice on 5th July, but, before they could do anything, the plaintiff sustained her fall. In her action against the board, Humphreys, J., held that, while it was not suggested that the leak itself was due to negligence on the part of the board, it was their common-law duty, as the leak had emanated from their pipes, to see that no member of the public suffered damage from the resulting dangerous condition. He held that they were under a duty, which conformed to what the board's witnesses had said was the usual practice, to notify the highway authority of the dangerous condition and meanwhile, which had not been done in this case, to-keep a man on the spot or otherwise give warning to the public of the danger. He therefore gave judgment for the plaintiff. The board's appeal was allowed, Evershed, L.J., with whom Somervell, L.J., agreed, holding (1) that the board owed no duty to give any such warning, whether they knew or did not know of the state of the pavement, and, in particular, (2) that they were under no such duty when the corporation, who were the highway authority, had as much knowledge of the state of the pavement as the board had, and (3) that there was not sufficient evidence that the board knew or ought to have known of the dangerous condition of the stones. Tucker, L.J., agreed that the appeal should be allowed, but solely on the ground that no duty was cast on the board in a case where the highway authority were in as full possession of the facts as were the board. The plaintiff appealed. The House took time for consideration.

LORD PORTER—the other noble lords concurring—expressed no opinion on the first two points, but said that the board were entitled to succeed on the third. They knew, no doubt, that the stones immediately round the stopcock required replacing, but the peccant stone and those in its immediate neighbourhood looked safe to those who did the work, as they did to the plaintiff. It was urged that the workmen who removed the six stones should have known that the percolation of water was likely to make the others unsafe, or at least should have tested them to see if they were safe, and that until they did so the board should have warned the public against a possible danger. It was, however, not permissible to infer that a skilled man would suspect a paving-stone of working loose or of becoming more liable to tilt owing to the percolation of water. He (his lordship) could imagine the opposite being the case. He was unable to draw an inference from that evidence that danger should have been feared or suspected. Nor was there any evidence to support such an inference. Appeal dismissed.

APPEARANCES: Levy, K.C., and Paterson (Darracotts); Pritt, K.C., and Roy Wilson (H. R. McDowell).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

## COURT OF APPEAL

## DIVORCE: PETITION DISMISSED IN COMMISSIONER'S PRIVATE ROOM

## Stone v. Stone

Bucknill, Cohen and Asquith, L.JJ.

11th October, 1948

Appeal from a county court judge sitting as a divorce commissioner.

The appellant sought a decree of divorce on the ground of his wife's alleged desertion. The petition, which was undefended,

was heard in open court. The husband put in a discretion statement, acknowledging one act of adultery. The commissioner reached no decision in open court, but later on the same day informed counsel for the husband in his private room that he refused to grant a decree nisi. Counsel indorsed his brief with the words "discretion refused," but the formal order recorded failure to make out the charge of desertion. The husband appealed.

BUCKNILL, L.J.—COHEN and ASQUITH, L.JJ., agreeing—said that the commissioner's order was invalid because it had been made in his private room. To hold otherwise would run counter to the fundamental rule that, with certain exceptions, a hearing must take place in open court. There must be a new trial. Appeal allowed.

APPEARANCES: Claude Duveen and Figgis (P. B. Topham, The Law Society).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

## DIVORCE: SECURITY FOR COSTS OF APPEAL

## Evans v. Evans

Bucknill and Denning, L.JJ., and Pilcher, J.

18th October, 1948

Applications for security for costs.

A wife applied that her husband should give security, and her husband applied that she should give security, for the costs of the wife's appeal from a decision of Mr. Commissioner Grazebrook, K.C., dismissing her petition for divorce on the ground of her husband's alleged cruelty. In the course of the hearing of the petition the husband had been ordered to give security for the wife's costs in the sum of £217, and the commissioner awarded the wife her costs against her husband, but limited to that amount.

BUCKNILL, L.J.—DENNING, L.J., and PILCHER, J., agreeing—said that it had been laid down that a wife who prosecuted an appeal to the Court of Appeal, unlike a wife who was respondent to an appeal, could not (even if the jurisdiction existed) require the husband to give security for costs in the absence of special grounds. Here there were no special grounds, and the wife's application failed. The husband based his application on the fact that his wife had no means whatever, and he also contended that she was being supported in her appeal by wealthy parents with whom she was living. In view of *In re Clough* (1887), 35 Ch. D. 7, there was no reason why an order for security for costs should not be made in this very unusual case, although the court was very reluctant to impose a condition on the right of a wife to appeal, the more so when she had a decree against her and was defending her marriage. That was not the case here, and the court, in the exercise of its discretion, would order the wife to give security for costs in the sum of £30. Wife's application dismissed. Husband's application allowed.

APPEARANCES: Ridley (Corbin, Greener & Cook, for Huntsman, Donaldson & Tyzack, Nottingham); Bickford-Smith (Fearnley-Whittinghall with him) (Maude & Tunnicliffe for Woolley & Co., Wolverhampton).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

## DIVORCE: CHOICE OF MATRIMONIAL HOME

## Dunn v. Dunn

Bucknill and Denning, L.JJ., and Pilcher, J.

19th October, 1948

Appeal from Jones, J.

The appellant, a chief petty officer in the Royal Navy, returned to England in 1941 after four years' service in the Far East. The matrimonial home, where his wife was at all times ready to receive him, was at Morpeth. On his return the husband was stationed at Immingham, where he obtained suitable accommodation and asked his wife to join him. She was exceedingly deaf, had a young boy at home, and had rarely left Morpeth. She was therefore unwilling to join her husband at Immingham, a port liable to enemy attack. Jones, J., dismissed the husband's petition for divorce on the ground of the wife's desertion, holding that she had not in the circumstances acted unreasonably in refusing to join him at Immingham. The husband appealed.

BUCKNILL, L.J., said that there was evidence on which the judge was entitled to find as he did, and that the appeal failed.

DENNING, L.J., agreeing, said that it was not a proposition of law that a husband had the right to say where the matrimonial home should be. Consequently, there was no legal burden on a wife to justify her refusal to follow her husband to a particular place: even if she had failed to prove affirmatively that she had just cause for her refusal, the court would still have to decide

whether the husband had discharged the legal burden which was on him of proving his case. As the decision where the matrimonial home should be was one which affected both parties and their children, it was the parties' duty to decide it by agreement and not by the imposition of the will of the one on the other. Each was entitled to an equal voice in the ordering of affairs which were their common concern. If an arrangement whereby a family spent their time together as a family were frustrated by the unreasonableness of one of the spouses, and that led to a separation between them, the party whose unreasonableness had produced that result would be guilty of desertion.

PILCHER, J., agreed with Denning, L.J.'s observations on the question of onus, expressed no opinion on the question of the right to choose the matrimonial home, but was of opinion on the facts that the wife had acted unreasonably, and that the appeal ought to be allowed. Appeal dismissed.

APPEARANCES: *G. R. F. Morris (Peacock & Goddard, for Goodman & Kent, Portsmouth); Ackner (Hewitt, Woollacott and Chown, for Swinburn G. Wilson & Son, Newcastle-on-Tyne).*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

### CHANCERY DIVISION

#### PLEADING: PARTICULARS

##### *Johnson v. Augarde and Others*

Jenkins, J. 19th October, 1948

#### Procedure summons.

The plaintiff brought this action against three defendants, claiming a declaration that the first defendant was a trustee for himself and the plaintiff of a house in Morden Way, Sutton, or the proceeds of sale thereof, and that a sale which he had purported to make of the house to the second defendant ought to be set aside, as being in breach of trust, and an account of all moneys received as purchase-money. The first defendant by his defence said he purchased the property in 1934 and it was conveyed to him, subject to a mortgage, and that the plaintiff had no interest in the property, save that the first defendant had orally agreed to permit him to reside in and occupy the top floor in consideration of his paying certain sums for rent and rates. The first defendant admitted that he had sold the property to the second defendant in December, 1947, but said that it was his own property, and denied that he had committed any breach of trust. The third defendant was a tenant. Paragraph 6 of the statement of claim alleged that at the time of the sale the second defendant was well aware that the first defendant was a trustee of the property for himself and the plaintiff. The second defendant now applied by summons for an order for particulars of this allegation, stating when and in what form it was alleged that he had received notice that the first defendant was a trustee, or how otherwise it was alleged that the second defendant became aware of the fact aforesaid.

JENKINS, J., said it was claimed that the application was for particulars of notice which ought to be given under r. 23 of Ord. 19. On the other hand it was contended by the plaintiff that the case came under r. 22, as being an allegation of a state of mind, which it was sufficient to allege as a fact without setting out the circumstances from which it was to be inferred. That turned on the effect of the decision of the Court of Appeal in *Burgess v. Beethoven Electric Equipment, Ltd.* [1943] K.B. 96. That decision was that the rule meant what it said, and that an allegation of knowledge could not be made the subject of an order for particulars. Counsel sought to escape from this decision by saying that para. 6 was really a plea of notice and not of a state of knowledge. The pleading seemed to his lordship to be literally within the terms of r. 22, and it would not be right to make any order for particulars.

APPEARANCES: *F. E. Skone James (Rodgers, Gilbert & Horsley); T. K. Wigan (Wilberforce Allen & Bryant).*

[Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.]

#### GIFT TO PAROCHIAL CHURCH COUNCIL: CHARITY *In re Norton's Will Trusts; Lightfoot v. Blo Norton Parochial Church Council*

Jenkins, J. 20th October, 1948

#### Adjourned summons.

The testator, G. W. Norton, who died in 1940, gave by his will £500 to the B.N. Parochial Church Council to be applied by them to any use they might think best for the benefit of the church and parish, but preferably for the support of the church schools, and a small provision for keeping in repair certain graves and the bier-house given by the testator and his wife on their golden wedding. The question was whether this created a valid charitable trust. The bier-house was a wooden building which had

been erected in the churchyard for use at funerals, but without a faculty.

JENKINS, J., said that the "small provision" was not to be additional to, but out of the £500 legacy. Upon the true construction of the gift, the use to which it might be put must be for the benefit of the church and the parish. That meant the church and the parishioners, which was a good charitable object, according to the well-known passage in Lord Selborne's judgment in *Goodman v. Mayor of Saltash* (1882), 7 App. Cas. 633, 642, approved in subsequent cases. In *Farley v. Westminster Bank* [1939] A.C. 430, the words used were "parish work," which might include objects not legally charitable, and that decision did not apply. The testator then expressed certain preferences of a precatory character, the main one being for the repair of the church school, which was charitable. Of the two smaller preferences, the power to spend money on the upkeep of tombs was invalid, but it could be regarded as creating only a moral obligation, which should be ignored, *per* Cohen, J., in *In re Dalziel* [1943] Ch. 277, 280. The repair of the building for housing the bier used at funerals was charitable, and the fact that no faculty had yet been granted for it did not affect its validity. Any moneys not used for the repair of the tombstones or the bier-house would be available for general charitable purposes. The bequest was generally valid.

APPEARANCES: *R. W. Goff (Burton, Yeates & Hart, for Lightfoot & Lowndes, Thame); J. H. A. Sparrow (Field, Roscoe and Co., for Hansell, Hales, Bridgewater & Preston, Norwich); A. de W. Mulligan (Burton, Yeates & Hart); H. O. Danckwerts (Treasury Solicitor).*

[Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law]

### KING'S BENCH DIVISION

#### DIVISIONAL COURT

##### SUSPECTED PERSON: SINGLE VISIT TO RACECOURSE:

##### "FREQUENTING"

##### *Clark v. Taylor*

Lord Goddard, C.J., Humphreys and Byrne, JJ.

20th October, 1948

#### Case Stated by Sussex justices.

The appellant was observed for a considerable period by the respondent, a police officer, at Plumpton racecourse moving repeatedly through a crowd of people and ultimately attempting to pick a pocket. Having been charged with contravening s. 4 of the Vagrancy Act, 1824, by being a suspected person and frequenting the racecourse, he contended that as he had only once visited the racecourse he could not be said to have frequented it. The justices convicted him, and he appealed.

LORD GODDARD, C.J.—HUMPHREYS and BYRNE, JJ., agreeing—said that if a man paid several visits in the course of an afternoon to a particular part of a racecourse, he was frequenting that part. *R. v. Clark* (1884), 14 Q.B.D. 92, decided, and was in contradistinction to the present case, that a man could not be said to be frequenting a street because he was merely walking down it and had not been in it before he was stopped by the police. The Penal Servitude Act, 1891, provided, by s. 7, that s. 4 of the Vagrancy Act was to be construed so that a person loitering with intent to commit a felony could be charged with frequenting under it. The offence of frequenting was thus complete if the defendant were proved to have been loitering with intent. Finally, the conviction could be supported by reference to *Airton v. Scott* (1909), 25 T.L.R. 250, where it was held that frequenting meant being in a place long enough for the purpose in hand: the appellant here had actually been seen to attempt to pick a pocket. Appeal dismissed.

APPEARANCES: *G. L. Hardy (Marris & Shepherd); Harold Brown (Walmsley & Stansbury, for J. E. Dell & Loader, Shoreham).*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

#### DIVISIONAL COURT

##### JUSTICES: DISQUALIFICATION

##### *R v. Pwllhell Justices; ex parte Soane*

Lord Goddard, C.J., Humphreys and Byrne, JJ. 20th October, 1948

#### Application for an order of certiorari.

The applicant was convicted of polluting a river, contrary to the Salmon and Freshwater Fisheries Act, 1923. He then discovered that the chairman of the justices, who was a member of the fisheries board which had prosecuted him, had been present at the meeting of the board at which it was resolved that proceedings should be taken against the defendant. The chairman stated in an affidavit which was not challenged that, though present at the meeting, he had taken no part in any formal business transacted at it, and, in particular, had taken no part in

the decision to prosecute the defendant. The defendant was convicted and fined and ordered also to "pay a sum for costs." He therefore made this application. By s. 76 of the Act of 1923, the mere fact that a justice is a member of a fisheries board does not disqualify him for adjudicating on a case arising under the Act.

**LORD GODDARD, C.J.**—**HUMPHREYS** and **BYRNE, J.J.**, agreeing—said that the chairman was entitled to adjudicate since he had neither voted for the resolution to prosecute the defendant nor taken part in instituting the prosecution or in the preliminary proceedings. The matter was clearly stated in *R. v. Henley* [1892] 1 Q.B. 504; 36 Sol. J. 233, which, like *R. v. Milledge* (1879), 4 Q.B.D. 332, on which the applicant had chiefly relied, was distinguishable from the present case. The order as to costs must, however, be quashed. The justices were under a duty by virtue of s. 18 of the Summary Jurisdiction Act, 1848, to fix the sum to be paid as costs. They were not entitled to make an order for an unspecified amount. What they might do was to adjourn a case for ascertainment of or agreement as to costs, and then to make an order for payment of the amount of costs so ascertained or agreed. Application dismissed.

**APPEARANCES:** *J. H. L. Royle (William Charles Crocker, for Gwynndaf Williams & Roberts, Pwllheli); H. V. Lloyd-Jones (Rhys Roberts & Co., for William George & Son, Portmadoc).*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

## PARLIAMENTARY NEWS

### HOUSE OF LORDS

Read First Time:—

**PREVENTION OF DAMAGE BY PESTS BILL [H.L.]**

[27th October.

To re-enact with modifications the Rats and Mice (Destruction) Act, 1919; to make permanent provision for preventing loss of food by infestation; and for purposes connected therewith.

**RAILWAY AND CANAL COMMISSION (ABOLITION) BILL [H.L.]**

[27th October.

To abolish the Railway and Canal Commission; to make provision for the future exercise of the performance of their functions; to amend and repeal certain enactments relating to their functions; and for purposes connected with the matters aforesaid.

### HOUSE OF COMMONS

Read First Time:—

**COLONIAL STOCK BILL [H.C.]**

[27th October.

To enable stock to which the Colonial Stock Act, 1877, applies to be made transferable by instrument in writing, and to provide for the extension of the Colonial Stock Acts, 1877 to 1934, to stock of Governments or authorities established for controlling or administering services or matters of common interest to the inhabitants of more than one of the colonies or territories to whose stock any of the said Acts apply or could be made applicable.

**DEBTS CLEARING OFFICES BILL [H.C.]**

[27th October.

To make provision as to the effect of the expiry of the Debts Clearing Offices and Import Restrictions Act, 1934.

**EDUCATION (SCOTLAND) BILL [H.C.]**

[27th October.

To amend the provisions of the Education (Scotland) Act, 1946, relating to attendance at junior colleges, to the powers of education authorities to provide education for pupils belonging to the areas of other authorities and to enable persons to take advantage of educational facilities and to other matters; and to amend the provisions of other Acts relating to defective children and the employment of children.

**IRON AND STEEL BILL [H.C.]**

[27th October.

To provide for the establishment of an Iron and Steel Corporation of Great Britain and for defining their functions, and for the transfer to that Corporation of the securities of certain companies engaged in the working, getting and smelting of iron ore, the production of steel, and the shaping of steel by rolling, and of certain property and rights held by a Minister of the Crown or Government department; for the licensing of persons engaged in any such activities; for co-ordinating the activities of the Corporation, the National Coal Board and the Area Gas Boards relating to carbonisation; and for purposes connected with the matters aforesaid.

**PRIZE BILL [H.C.]**

[29th October.

To make provision as to the payment, and the distribution or application, of any prize money granted by His Majesty out of the proceeds of prize captured in the late war, as to payments and receipts in respect of proceeds of prize to or from the Govern-

ment or a court of a part of His Majesty's dominions outside the United Kingdom, to extinguish for the future the prerogative rights to make grants of prize money to captors and to grant prize bounty; and for purposes connected with the matters aforesaid.

**RECALL OF ARMY AND AIR FORCE PENSIONERS BILL [H.C.]**

[27th October.

To make provision for enabling discharged soldiers or airmen in receipt of service pensions to be recalled for service in an emergency; and for purposes connected therewith.

**SAVINGS BANKS BILL [H.C.]**

[27th October.

To amend the law relating to trustee savings banks, to abolish naval savings banks, to extend the powers of the Postmaster-General under Section two of the Savings Banks Act, 1904; and for purposes connected with the matters aforesaid.

**WAGES COUNCILS BILL [H.C.]**

[28th October.

To repeal Part I of the Road Haulage Wages Act, 1938, and, so far as it relates to the Central Board established under the said Part I, the Holidays with Pay Act, 1938; to convert the said Central Board and any order in force under the said enactments (so far as repealed) into a wages council and a wages regulation order under the Wages Councils Act, 1945; to amend the last-mentioned Act in certain respects and for purposes connected with the matters aforesaid.

**WATER (SCOTLAND) BILL [H.C.]**

[27th October.

To amend the law with respect to rating and charging for water supplies in Scotland; to amend Part V of the Local Government Act, 1948, with respect to the ascertainment of the standard amounts thereunder in Scotland; to increase the financial assistance that may be given to local authorities in Scotland under the Rural Water Supplies and Sewerage Act, 1944; to amend the Water (Scotland) Act, 1946; and for purposes connected with the matters aforesaid.

**WIRELESS TELEGRAPHY BILL [H.C.]**

[29th October.

To amend the law relating to wireless telegraphy.

Read Second Time:—

**EXPIRING LAWS CONTINUANCE BILL [H.C.]**

[29th October.

To continue certain expiring laws.

## RECENT LEGISLATION

### STATUTORY INSTRUMENTS 1948

- No. 2360. **Coal Industry Nationalisation** (Company Adjustment) Regulations, 1948. October 25.
- No. 2340. **Companies** (Stock Exchange) (No. 2) Order, 1948. October 22.
- No. 2382. **Control of Building Operations** (No. 12) Order, 1948. October 22.
- No. 2349. **Criminal Justice Act, 1948** (Date of Commencement) (No. 3) Order, 1948. October 25.
- No. 2329. **Railway and Canal Securities** (Conversion Date) (No. 12) Order, 1948. October 20.
- No. 2302. **Town and Country Planning** (Development by Local Planning Authorities) Regulations, 1948. October 14.

[Any of the above may be obtained from the Publishing Department, S.L.S.S., Ltd., 88/90, Chancery Lane, W.C.2.]

## CORRESPONDENCE

[The views expressed by our correspondents are not necessarily those of THE SOLICITORS' JOURNAL]

### The Rushcliffe Report and Divorce

Sir,—With reference to the statement in the article in your issue of the 9th October [*ante*, p. 567] that the cost of preliminary inquiries would have to be borne by the parties (except in so far as it may later be recovered from the other side), it is hoped that the Legal Aid Bill will contain a clause enabling provision to be made, possibly by a scheme of the Charity Commissioners, for the unclaimed deposits held by Poor Persons Committees to be used as a fund to help parties to a divorce with these preliminary inquiries. The amount held by The Law Society and provincial Poor Persons Committees and not likely to be claimed may be about £20,000, and it seems fair to assume that if those who, having obtained their own divorce, did not trouble to claim the balance of their deposits, could be consulted now, they would welcome the idea of these sums being used to help others.

Manchester, 2.

**FELIX E. CROWDER,**  
Honorary Secretary,  
Manchester & Salford Poor Man's  
Lawyer Association.

## TO-DAY AND YESTERDAY

## LOOKING BACK

ON 6th November, 1751, the Gray's Inn Benchers ordered "that new wooden pallsadoes be put up behind the Chapel and at the steps going up to the Duchy Office and that the steps be new laid and repaired." At this time the office of the Duchy of Lancaster had long been located in the chambers between the Hall and the Chapel, but the layout of this part of the Inn was then quite different from now. Coney Court (as Gray's Inn Square was then called) was joined to Holborn Court (as South Square was then called) by a passage along the east end of the Chapel, while the Chapel itself was not built against on the south side, as it subsequently was. That side, however, gave on to a tiny court having an outlet in the passage between the two squares and otherwise shut in by a huddle of buildings erected at different times. At the far end of this little court were the steps leading up to the entrance of the Duchy Office. In 1788 the Benchers' Pension Chamber was established in the old Duchy Office and in early Victorian times the irregular buildings in the north-east corner of Holborn Court were replaced by a new range, set right against the Chapel's south wall, comprising a library room above and a more spacious Pension Room below. Hall, Chapel, Library and old Duchy Office building were all burnt in the war. Subsequently the Duchy of Lancaster made a presentation of books to the Society to help to make up its losses.

## THE BAR'S REWARDS

EVIDENCE submitted to the Evershed Committee on High Court Practice and Procedure seems to indicate a depression over the Temple so far as the remuneration of its inmates is concerned. An analysis of the answers to a questionnaire sent out by the General Council of the Bar suggests that even among juniors of a certain experience and gainfully employed (to use a term which smacks of the inappropriate in this context) the average income in London is £275 a year, while in the provinces it drops to £212. More successful common-law juniors may apparently rise to an average of £1,332 in London and £1,385 in the provinces, while the more spacious atmosphere of Lincoln's Inn can make the Chancery fee-book bloom to the extent of £1,610. Only the select circle of fashionable "silks" can rejoice their dependants with an annual increment of £50,000 (less toll to the State). For the rank and file the prospects of personal survival in the world as it is seem problematical in the extreme. If the Bar be, as is sometimes said, a trade union, rates of pay represent an aspect of its potential activities long neglected. It always appears to have been the same story. Just over a hundred years ago a most discouraging comparison was made as to the expenses and the returns of early practice at the Bar. The expenses for the first five years were reckoned at a minimum of £1,360 all told, while a typical fee-book of a not unsuccessful man showed in those five years takings of £54, £92, £140, £198 and £237 respectively—total £721. That was not far off the beginnings of the first Lord Russell of Killowen in his first four years: 7 guineas, 70 guineas, 140 guineas and 400 guineas respectively. ("From that time I went rapidly forward.") No doubt things were much the same in the reign of Edward IV when the parish books of St. Margaret's, Westminster, record payment to "Roger Fylpott, learned in the law, for his counsel 3s. 4d. with 4d. for his dinner."

## PAYMENT IN KIND

SOMETIMES counsel's fees are not of the sort that can figure in an income tax return. "I have nothing to pay you with, sir, but my heart," said one poor and unprepossessing lady to her successful advocate. "Hand it over to the clerk, if you please," he replied, "I wish no fee for myself." Sir Walter Scott's first client, a burglar, whom he got off, paid him only with two pieces of advice (a) that a yelping terrier inside a house was a better protection than a big dog outside, and (b) that an old rusty lock was the hardest to negotiate.

"Yelping terrier, rusty key,

Was Walter Scott's first Jeddart fee."

When Frank Lockwood had done his best in the defence of Charles Peace he received from his cell the gift of a ring which his client said he had worn for years. It was a most evil-looking thing and, made as it was of the basest of metals and of massive structure, bore a suspicious resemblance to what is called a knuckle-duster. That was Lockwood's sole reward, and when someone congratulated him on his defence of "Peace with Honour," he replied that it was not "Peace at any price."

## NOTES AND NEWS

## Honours and Appointments

Sir EDWARD HOLROYD PEARCE has been elected a Bencher of the Honourable Society of Lincoln's Inn.

Mr. F. P. BOYCE has been appointed Deputy Clerk to the Hertfordshire County Council. He was admitted in 1939.

Mr. W. Wood, Deputy Town Clerk of Grimsby, has been appointed Principal Assistant Solicitor to Sheffield City Council. He was admitted in 1937.

Mr. J. E. McCOMB, Deputy Clerk and Assistant Solicitor to Lancashire County Council, has been appointed General Manager of the Development Corporation set up by the Minister of Town and Country Planning to create two new towns in Hertfordshire. He was admitted in 1932.

## Notes

The address of the Northern Circuit Office is now St. George's Hall, Liverpool.

## PRACTICE NOTE

## VALUE OF PROPERTY FOR PROBATE PURPOSES

The concession granted by the Chancellor of the Exchequer in the case of a house owned and occupied by the deceased that, in certain circumstances, any increase in the market value above the pre-war value in so far as it would only be realised by a sale with vacant possession may be disregarded for estate duty purposes, does not apply to the value required in connection with a grant of representation.

The true value of the property at the date of death of the deceased must be taken for the purpose of probate fees, penalty in bond and any life interest that may arise. In the absence of a professional valuation of property, solicitors may estimate the value, which will be accepted by the probate authorities if it appears to be a reasonable one.

Such a case may conveniently be dealt with by filling up and annexing a form No. 15 to the Inland Revenue affidavit and completing the Inland Revenue affidavit in accordance with that form. Copies of the form No. 15 may be obtained where the Inland Revenue affidavit is supplied or from the Controller, Estate Duty Office.

H. A. de C. PEREIRA,

Registrar.

Principal Probate Registry,  
Somerset House, Strand, W.C.2.  
27th October, 1948.

## COURT PAPERS

## SUPREME COURT OF JUDICATURE

MICHAELMAS SITTINGS, 1948

COURT OF APPEAL AND HIGH COURT OF JUSTICE  
CHANCERY DIVISION

ROTA OF REGISTRARS IN ATTENDANCE ON GROUP A  
EMERGENCY ROTA APPEAL COURT I MR. JUSTICE MR. JUSTICE  
VAISEY ROXBURGH

Date	Mr. Jones	Mr. Adams	Mr. Andrews	Mr. Adams	Mr. Andrews
Mon., Nov. 8	Reader	Andrews	Jones	Reader	Jones
Tues., " 9	Hay	Farr	Hay	Farr	Farr
Wed., " 10	Adams	Hay	Adams	Hay	Hay
Thurs., " 11	Adams	Farr	Adams	Farr	Farr
Fri., " 12	Adams	Farr	Adams	Farr	Farr
Sat., " 13	Adams	Farr	Adams	Farr	Farr

GROUP A  
MR. JUSTICE MR. JUSTICE MR. JUSTICE MR. JUSTICE  
WYNN PARRY ROMER JENKINS HARMAN

Date	Non-Witness	Witness	Non-Witness	Witness
Mon., Nov. 8	Mr. Farr	Mr. Jones	Mr. Reader	Mr. Hay
Tues., " 9	Adams	Reader	Hay	Farr
Wed., " 10	Adams	Hay	Farr	Adams
Thurs., " 11	Jones	Farr	Adams	Andrews
Fri., " 12	Reader	Adams	Andrews	Jones
Sat., " 13	Hay	Andrews	Jones	Reader

## "THE SOLICITORS' JOURNAL"

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